83-1983

NO.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1983

PETER M. LOPEZ
Petitioner,

v.

UNITED STATES
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE CIRCUIT COURT OF APPEALS
FOR THE ELEVENTH JUDICIAL CIRCUIT

PETER M. LOPEZ IN PRO PER.
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QUESTIONS PRESENTED

I. Whether a misstatement of priority dates on an immigration adjustment of status form is "material" as defined by 18 U.S.C. § 1001 such that it has the capacity to impair or pervert the functioning of a government agency even though the statement automatically causes the agency to routinely deny the application?

II. Whether a new trial is mandated by the sixth amendment when a juror's attention and judgment have been impaired due to alcoholic intoxication?

III. Whether a new trial is warranted by the sixth amendment when one or two jurors have lied when questioned about their respective responses to prejudicial publicity concerning the case?

IV. Whether a trial court violates the sixth amendment when the court fails to recount testimony regarding the practical result of leaving a government application form blank when the defendant's defense for filling in a false date on the form is that he only did so to achieve an adjudication of the application on the merits and that he did not intend to derive any benefit therefrom or materially mislead a government agency?

V. Whether convictions may properly be based purely upon grand jury transcript testimony recited at trial, without benefit of the sixth amendment right of cross-examination, when the absence of live witnesses is due to government failure to call those witnesses?

TABLE OF CONTENTS

Table of Contents, Continued

TABLE OF AUTHORITIES

CASES

Cases Continued: Page

Cases Continued: Page

Cases Continued: Page

CONSTITUTIONAL PROVISIONS

STATUTES

RULES

SECONDARY SOURCES

OPINIONS BELOW

The petitioner, Peter M. Lopez, was convicted on November 3, 1982, in the United States District Court for the Southern District of Florida. (A-1) A motion for new trial was denied. (A-2, A-8) The United States Court of Appeals for the Eleventh Circuit affirmed the conviction on March 30, 1984. (A-9 to A-22) The decision is reported at 728 F.2d 1359 (11th Cir. 1984). A petition for rehearing en banc was denied on May 7, 1984. (A-23) Petition for Writ of Certiorari was timely presented to this Court.

JURISDICTION

The judgment of the Court of Appeals was entered March 30, 1984. The petition for rehearing and en banc consideration was denied on May 7, 1984. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This appeal rests on the interpretation of 18 U.S.C. § 1001 and the sixth amendment to the United States Constitution.

STATEMENT OF THE CASE

The petitioner, Mr. Lopez, was indicted and convicted by a jury on all 22 counts, for making false statements in violation of 18 U.S.C. §§ 1001 and 1002 as a result of his inclusion of certain false dates on various

I-485 United States Immigration and Naturalization Service (INS) forms filed on behalf of various aliens whom Mr. Lopez represented. Mr. Lopez's motion for a new trial was denied and he was sentenced to serve one (1) year and one (1) day and two (2) years probation by the United States District Court, Southern District of Florida, Miami Division, the Honorable William A. Hoeveler presiding. Timely appeal was taken to the United States Court of Appeals for the Eleventh Circuit. The conviction was affirmed by the panel. United States v. Lopez, 728 F.2d 1359 (11th Cir. 1984). The petition for rehearing and en banc consideration was denied on May 7, 1984.

Mr. Lopez represented 22 aliens who were seeking residency in the United States. Mr. Lopez planned to consolidate these cases and file a class action suit against the INS pre-

ference quota system. Indeed, Mr. Lopez did file a class action on behalf of his clients. Alternatively, Mr. Lopez planned to obtain a private bill in Congress whereby his clients' citizenship applications could be expedited. Mr. Lopez had successfully obtained private bills in the past. In order, however, to implement either of these remedies, Mr. Lopez testified that he needed to first exhaust his clients' administrative remedies. This was not possible, however, because Mr. Lopez had an argument with Mr. McAtee--the INS Travel Control Director--who informed Mr. Lopez that he would block each of Mr. Lopez's cases. The net effect of this blockage was that it prevented the files from being rejected on the merits, thereby precluding exhaustion of administrative remedies. Therefore, Mr. Lopez sought to get an adjudication which would permit him to file in federal court or

seek to introduce a private bill.

Mr. Lopez subsequently filed I-485 adjustment of status forms with the INS on behalf of his clients. A portion of this form, box 22A, has a space for a "priority date" where the alien lists the Consular Office and year he or she entered a priority registration. If this space is left blank, the application will be rejected outright. If it is not left blank, the application is routinely indexed against Department of State Bulletins which contain a Visa Operation Manual with priority dates and quotas for the countries of origin of the applicants. If the priority date meets the quota and priority number, the information is routinely verified by sending a telex to the designated Consular Office of the applicant's country of origin. If the priority date is not acceptable pursuant to the Visa Operation Manual

numbers, it is routinely rejected on its merits. Likewise, if the priority date is not confirmed by the appropriate Consular Office it is rejected on its merits.

Therefore, Mr. Lopez filled in the blank spaces with dates in order to achieve a rejection on the merits which would constitute an exhaustion of remedies. Some of Mr. Lopez's clients paid small fees and others paid no fees at all.

At trial, the government introduced testimony from some of the aliens and also grand jury testimony regarding other aliens. The defense objected to the grand jury testimony but was overruled.

Mr. Lopez testified that he did not intend to defraud anyone by filling in box 22A and, indeed, that this action could not have resulted in any direct benefit to his clients. This was corroborated by expert

testimony from Vincent Schiano, who testified that the mere assertion of a priority date on the adjustment application only entitled an applicant to an interview. Moreover, every application with a priority date was routinely checked against the visa quota numbers and, if necessary, verified by sending a Telex to the appropriate Consular Office.

During its deliberations, the jury requested that its recollection be refreshed as to what would have occurred if box 22A of the forms had been left blank. The court, however, declined to read the pertinent portions of testimony. Rather, it informed the jury that it should continue its deliberations and use its own recollection. The court stated:

> Mr. Perlman, I have your question. I will read it for the record: "3 November 1982. The jury would like this information: If Mr. Peter M. Lopez had submitted Form I485 without Box 22 filled in, left blank, non-written in, not available written in,

would Form I485 have been rejected or sent back incomplete? Is there testimony from either expert witness stating this?"

Well, unfortunately, you ask us a question that is very difficult to answer in this setting. I have been over this question with the lawyers. We, of course, all want to try and help you the best way we can.

I cannot repeat testimony for you. I am going to have to ask you to use your collective recollections to remember as best you can the testimony that has been given and arrive at whatever verdict you can arrive at by using your best recollection.

I will tell you, frankly, and I hesitate to mention this to you, the only other way is to read all of the testimony of both experts back to you, which would take several hours. I am loathe to do that, because I feel that if you pool your collective recollection of the testimony, hopefully, you can come up with your answers.

So, my statement to you in response to your question, and I dislike being unhelpful, but I think I must under these circumstances say to you: Please use your best collective recollection as to what the testimony was and continue your deliberations under those circumstances.

Thank you. I'm sorry I can't be of more help as to this particular question.

If you have any further questions, please let me know.

Thank you.

After the verdict was returned, Mr. Lopez made a motion for new trial. The issues therein raised were essentially the same as those presented to this Court. Two of these issues involved juror misconduct. First, juror number one was reported to have been consuming alcohol from a pocket bottle. Moreover, he was drowsy and inattentive and was seen staggering. This point was not raised during the trial. Second, Juror Pearlman (juror number two) overheard a news report indicating that Mr. Lopez was on trial for falsifying immigration records. This juror told Juror Piggott (juror number six) what he had heard. (TR at 429) Juror number six, however, did not respond when the jury was initially questioned about the knowledge

of radio, television, or newspaper coverage. Furthermore, when juror number six was later questioned about the incident, he contradicted juror number one's account of what transpired. Juror number one stated that juror numbe. six made no reply. Juror number six, however, stated that he replied: "That doesn't worry me. I don't have to worry about that. My job is to make a decision, guilty or not guilty."

The other issue presented was whether Mr. Lopez's attorney--Bernard Yedlin--provided Mr. Lopez with inadequate representation. Mr. Yedlin did not present evidence regarding the aliens involved which materially refuted the government position that Mr. Lopez sought to defraud the government or even adversely affect any decision of the INS. Moreover, Mr. Yedlin was experiencing domestic difficulties during the trial

and was so emotionally troubled that he wept in the jury's presence.

REASONS FOR GRANTING CERTIORARI

The Court of Appeals for the Eleventh Circuit has adopted a definition of "materiality" under 18 U.S.C. § 1001 which is in direct conflict with the definition of "materiality" adopted by the Courts of Appeals for the Tenth and District of Columbia Circuits. Moreover, the federal courts below decided important questions involving interpretation of the sixth amendment rights to confrontation, assistance of counsel and jury trial.

I. THE PETITIONER WAS NOT PROPERLY CONVICTED OF MAKING FALSE STATEMENTS IN VIOLATION OF 18 U.S.C. § 1001 BECAUSE THE STATEMENTS IN QUESTION WERE NOT MATERIAL AND THE ELEVENTH CIRCUIT'S CONCLUSION THAT THEY WERE WAS IN DIRECT CONFLICT WITH APPLICABLE AUTHORITY.

Mr. Lopez contends that he was not properly convicted under 18 U.S.C. § 1001 because the representations made on the I-485 forms concerning the dates in question do not constitute material statements. At the time the subject I-485 forms were filed with the INS, the applicable immigration quotas had been filled. Mr. Lopez realized that filing these forms would thus have no negative effect on the INS, nor would it extend any benefit to the aliens on whose behalf they were filed. The only reason Mr. Lopez filed the forms was to receive a denial of the aliens' requests for residence whereupon the

aliens' administrative remedies would be exhausted. The false dates were listed on the form to allow the INS to consider the application for residence complete, whereupon they would be denied. After this administrative process, Mr. Lopez planned to file a class action challenge on behalf of the aliens and others similarly situated, against the current immigration quota and preference system. Alternatively, Mr. Lopez planned to obtain a private bill in Congress for his clients, a procedure which he had successfully brought about on prior occasions. The legitimacy of Mr. Lopez's intentions is clearly manifested by the fact that he did indeed file a class action on behalf of his clients and charged some of his clients a nominal fee and others no fee at all. It is abundantly clear that Mr. Lopez's intent was not to defraud or materially mislead a federal agency to obtain

a favorable action by the agency. Rather, his filing of the class action suit, taking clients at nominal or no fees, and the plan to introduce a private bill all belie the government's theory. Plainly, he did not possess the requisite intent to violate federal law.

The false dates were never intended to result, nor could they have had the effect of resulting, in a favorable decision on residence from the INS. Since all entries in box 22A were routinely checked against the Visa quotas and, if necessary, confirmed at the appropriate Consular Office, the entry could not possibly deceive the government nor could it result in any benefit to any alien. Indeed, it is submitted, the statements were not "material."

The law is clear that convictions under § 1001 are not proper when based upon mere

pro forma and insignificant statements such as those that are the subject of this case. No conviction under § 1001 is proper unless the false statements are material to the functioning of the federal agency or department before which they are made. See United States v. Race, 632 F.2d 1114 (4th Cir. 1980); United States v. Valdez, 594 F.2d 725 (9th Cir. 1979); United States v. Voorhees, 593 F.2d 346 (8th Cir.), cert. denied, 441 U.S. 936 (1979); United States v. Talkington, 589 F.2d 415 (9th Cir. 1978); United States v. Johnson, 530 F.2d 52 (5th Cir.), cert. denied, 429 U.S. 833 (1976); United States v. Krause, 507 F.2d 113 (5th Cir. 1975); United States v. Jones, 464 F.2d 1118 (8th Cir. 1972), cert. denied, 409 U.S. 1111 (1973); Paritem Singh Poonian v. United States, 294 F.2d 74 (9th Cir. 1961); Gonzales v. United States, 286 F.2d 118 (9th Cir. 1960), cert.

denied, 365 U.S. 878 (1961). The requirement of materiality is traditionally summarized as follows:

> In the context of § 1001, materiality means that the false statement must have a natural tendency to influence, or be capable of affecting or influencing, a government function. United States v. Krause, 5th Cir. 1975, 507 F.2d 113; Freidus v. United States, 96 U.S.App. D.C. 133, 223 F.2d 598, 601 (1955).

United States v. McGough, 510 F.2d 598, 602 (5th Cir. 1975).

The Eleventh Circuit theorized that Mr. Lopez's statements perverted an agency function because the pending false applications might render the applicants eligible for collateral benefits such as work or travel permits. 728 F.2d at 1362. It is submitted that the conjecture falls woefully short of the requisite "capacity to influence" required by the statute.

The case which best illustrates the

weakness of this "what if" analysis is the case of United States v. Beer, 518 F.2d 168 (5th Cir. 1975). In Beer, the Federal Deposit Insurance Corporation (FDIC) gave the president of a bank a questionnaire which was designed to elicit information including "all extensions of credit made since last examination for accommodation of others than those whose names appear on bank's records or on credit instruments in connection with such extensions." Id. at 169. The president responded "none" even though he knew that he himself had been "accommodated" by a $28,000 loan. In the subsequent 18 U.S.C. § 1001 prosecution, the court observed that the "materiality" requirement of the statute remained unsatisfied:

> The testimony of Ray, the bank examiner, reveals no evidence of how the particular statement here could have affected any decision of the FDIC other than that he would not have been authorized to cancel the bank's insurance because of it.

. . . .

> Although this requirement of specificity has not been alluded to as such in prior cases, the evidence of nature of the statements were such in those cases that the potential for subversion of the agency's functioning could readily be inferred. From the record in this case that inference is simply absent. Only a few weeks after Beer made the statement the loan in question was repaid and the bank suffered no loss. If, in the opinion of the bank examiner, the loan was questionably collateralized, what would the FDIC have done had it learned of the accommodation from the questionnaire? How could its functions, or some determination which it was required to make, have been impaired? From the evidence in this record we cannot answer these questions with that degree of certainty sufficient to justify a felony conviction under the terms of the statute.

Id. at 172.

It is significant to note that the court refused to impose upon the defendant conjecture or supposition regarding the possible impact of the falsehood. Clearly, a scenario could have been created in which the FDIC

might conceivably have been led to "rely upon" or be "influenced by" the prevarication. For example, it could be speculated that the FDIC might waive further examination of this particular bank and its president. Perhaps the results of the examination could cause the FDIC to decide that since there existed so little unrecorded self-accommodation in the nation's banks that it would not need to hire as many examiners in the next fiscal year. The possibility for such speculative supposition appears endless.

Similarly, in United States v. Schnaiderman, 568 F.2d 1208 (5th Cir. 1978), the court did not engage in creating phantom possibilities. In Schnaiderman, the court adopted the so-called "exculpatory no" exception to a § 1001 prosecution. In part, the court relied upon the fact that the government failed to show genuine materiality. The

court observed: "Perversion of a governmental body's function is the hallmark of a § 1001 offense." Id. (quoting United States v. Lambert, 501 F.2d 943, 946 (5th Cir. 1974)). Moreover, the court noted that § 1001 "must in each instance of its application derive the substance of its prohibition from the circumstances in which the statement is used." 568 F.2d at 1213 (quoting United States v. Gomez Londono, 422 F. Supp. 519, 525 (S.D.N.Y. 1976), rev'd on other grounds, 553 F.2d 805 (2d Cir. 1977)). Applying these principles to the case before it, the court noted that the exculpatory negative response to a query whether the defendant was carrying over $5,000 through customs did not pervert or otherwise influence a government agency's operation. As in United States v. Beer, supra, the court could have engaged in speculation about the impact of such a falsehood.

For example, if every person entering the United States responded with an exculpatory no to queries regarding whether they were carrying over $5,000 into the country, the agency might have allowed that person to carry the excess money into the country undetected. This would have the net effect of increasing the amount of currency in the United States without an attendant recording of that increase. The conjecture regarding the impact on federal agencies of such an unrecorded increase in in-country currency is potentially endless. Needless to say, the court did not engage in such speculation and reversed the conviction due to lack of materiality. See also United States v. Granda, 565 F.2d 922 (5th Cir. 1978).

The Eleventh Circuit Court of Appeals also placed great reliance upon United States v. Diaz, 690 F.2d 1352 (11th Cir. 1982), and

United States v. Lichenstein, 610 F.2d 1272 (5th Cir.), cert. denied, 447 U.S. 907 (1980), in ruling that the instant misrepresentations were "material." In Lichenstein the defendants mislabeled whiskey which was being imported. In Diaz, the defendants overbled blood donors and then falsified the identification information regarding the blood. Diaz, however, is readily distinguishable from the instant case. First, the misstatements had a real impact on public health. The prevarication regarding donor identity placed blood into circulation from falsely identified sources, thus making disease and infection control virtually impossible. Second, the conduct precluded the Food and Drug Administration (FDA) from protecting certain donors who were being overbled.

The Eleventh Circuit's reliance upon

United States v. Lichenstein, supra, is also misplaced. In that case the mislabeling of whiskey was found to have the capacity "to impair or prevent the functioning of a governmental agency" because customs and census data would become skewed and inaccurate.

Mr. Lopez concedes that the facts of these cases raise a real potential for perversion of an agency's function. The instant case, however, is distinguishable in that no similar impairment of an agency function occurred. As previously noted, the instant forms were routinely handled by checking the priority dates against applicable Visa quotas and, if necessary, by verifying the dates by sending a Telex to the appropriate Consular Office. This inevitable discovery obviated any of the potential dangers perceived in Diaz and Lichenstein.

The Lichenstein decision was cited by

the government in its brief to the Eleventh Circuit as persuasive authority for the proposition that the dates submitted by Mr. Lopez satisfied the "materiality" requirement. The government asserted that the result in Lichenstein was controlling because the defendants there failed to persuade the court that their misrepresentations were not material simply because the practice of Customs was not to rely on the statements. This apparent analogy to the instant case is, however, deceptive. Even cursory scrutiny of the Lichenstein decision reveals the manifest distinctions between that case and the present one.

In Lichenstein, the possibility--indeed the probability--existed that the erroneous information would pass undetected. True, as pointed out by the government, the defendants in Lichenstein cited Customs' practice not to

question certain excessive quantities of goods--including whiskey. The situation is, however, completely distinguishable from the instant one. The defendants in Lichenstein could only allege a traditional, "liberal" construction of the term "vessel supplies," which often allowed their misstatements to proceed undiscovered. In the present case it was the agency procedures themselves which precluded the undetected passage of the erroneous information. Indeed, this was precisely the intention behind the misstatements. They were designed to be detected so that the applications would be denied on the merits. Therefore, unlike Lichenstein, the false information could not have passed unscrutinized and, thus, could not have been capable of misleading the agency so that it would be influenced to act or forego acting.

Lichenstein would provide a more appro-

priate analogy if Customs engaged in a routine procedure whereby the information filed was always subject to detailed scrutiny through an independent third source. For example, if the amount of whiskey the ship ultimately delivered to its destination was always verified, and the defendants knew that it would be verified, a better analogy would be provided. It is submitted that if, regardless of the characterization of the whiskey as "vessel supplies," the erroneous information would have nevertheless been discovered, the result in Lichenstein would have been markedly different. If the statement would inevitably be discovered to be false, it could not have been found to be capable of influencing.

In the course of interpreting Mr. Lopez's conduct as violative of the materiality requirement, the Eleventh Circuit panel

adopted a novel interpretation of the term "material," which purportedly included Mr. Lopez's conduct. The panel concluded that the materiality requirement was satisfied because the instant misstatements caused the INS agency officials "to engage in needless work." 728 F.2d at 1363. It is well-established, however, that this criterion falls far short of the recognized test for materiality. For example, in United States v. Radetsky, 535 F.2d 556 (10th Cir.), cert. denied, 429 U.S. 820 (1976), a physician was tried for and convicted of the offense of making false statements in certain Medicare claims processed through his office. The Medicare claims were shown to have requested compensation for various medical services that had never been rendered, and to have inflated the value of services that had been rendered. The defendant, however, attacked

the counts on the ground that the materiality of the false statements had never been shown. Specifically, the defendant claimed that materiality was of necessity lacking in certain counts relating to charges for prescription drugs because the drugs were not compensable under Medicare. The defendant asserted that even if he had made false statements regarding the prescription of these drugs in Medicare applications, no agency of the government could be hurt in any way, nor could he have been benefited, because the statement could never result in any payment to him by the government.

The court agreed with the defendant and reversed his conviction on the affected false statements counts. The court reasoned that, as suggested by the defendant, since the drugs to which the false statements related were not compensable, the agency handling the

Medicare compensation claims would in no way have been affected by the statements. Rather, such statements would simply have been ignored by the agency.

Likewise, in Weinstock v. United States, 231 F.2d 699 (D.C. Cir. 1956), the defendant had filed an affidavit with the Subversive Activities Control Board concerning a committee that the defendant was to have chaired: the United May Day Committee. In this affidavit the defendant made numerous statements concerning the characteristics and activities of his committee. One example of the many statements made in the defendant's affidavit was that the committee was organized each year, functioned for approximately six weeks, and then was dissolved. Another example was the statement that there had been no committee or organization known as or having the name United May Day Committee

since May 1948.

The government based its prosecution on the fact that the immediately preceding statement was false. The defendant claimed that even assuming falsity, the statement was not material. The court reviewed the nature of the investigation being conducted by the government agency before which the statement was made, and the potential adverse impact thereon, and concurred with the defendant. The court noted that the issues being investigated were whether the committee which was chaired by the defendant was an annual or continuous organization, and whether the organization existed on a precise day, May 6, 1953. The court then surveyed the entire affidavit of the defendant and found that the defendant had stated that a committee of a similar yet different name to which he belonged was in existence on the date in

question. From the affidavit of the defendant taken as a whole, the court found that the government had been put on notice of the defendant's committee activities. The precise information conveyed by the defendant concerning the existence of the United May Day Committee may have been flawed, the court reasoned, but since the government knew all of the essentials, they in no way could have been adversely affected.

The clear import of the foregoing authority is that the "forcing agents to do extra work" standard is an inappropriate measure of materiality. Moreover, it is clear that the "extra work" involved no investigation or inquiry. First, the extra "work" at most involved looking at a Visa Operation Manual and observing that the preferences are all closed for Mr. Lopez's clients' countries of origin--regardless of

what dates were filled in. Second, even engaging in the unlikely assumption that the instant applications would not be rejected outright, the accuracy of the priority dates was nevertheless routinely verified by sending a Telex to the Consular Office.

As in Radetsky and Weinstock, the instant misstatements could not result in a perversion of the function of a government agency. In Radetsky the Medicare system was organized such that certain drugs were non-compensable. In Weinstock, the government's first hand knowledge regarding the defendant's committee membership precluded disruption of an agency function due to misstatements. Similarly, in the instant case, the misstatements would automatically result in rejection of the applications. The process of detection and rejection would result in no more "extra work" than that

required in Radetsky and Weinstock. All three cases involved some governmental effort which resulted in detection of the misstatement. Nevertheless, the Tenth and District of Columbia Courts of Appeal did not find "materiality" based upon the elusive "extra work" standard.

It is submitted that the foregoing authority reveals that the Eleventh Circuit adopted and applied an incorrect standard for gauging materiality. At a minimum, however, the standard employed in the instant case is in direct conflict with that applied in the Courts of Appeals for the Tenth and District of Columbia Circuits. See United States v. Radetsky, supra; Weinstock v. United States, supra.

II. A NEW TRIAL IS MANDATED BY THE SIXTH AMENDMENT WHEN A JUROR'S ATTENTION AND JUDGMENT HAVE BEEN IMPAIRED DUE TO ALCOHOLIC INTOXICATION.

The courts have scrupulously ensured that relief is granted to defendants prejudiced by juror misconduct. See United States v. Meisner, 488 F. Supp. 1342 (S.D. Fla. 1980), aff'd sub nom. United States v. Phillips, 664 F.2d 971 (5th Cir. 1981), cert. denied, 457 U.S. 1136 (1982); United States v. Richman, 600 F.2d 286 (1st Cir. 1979); United States v. Khoury, 539 F.2d 441 (5th Cir. 1976), cert. denied, 429 U.S. 1040 (1977). In particular, the courts have declared that the consumption of alcoholic beverages by jurors is improper. See State v. Hall, 235 N.W.2d 702 (Iowa 1975), cert. denied, 434 U.S. 822 (1977). See generally Annot., "Use of Intoxicating Liquors by Jurors: Criminal Cases," 7 A.L.R.3d 1040

(1966). The courts have ordered relief if the defendant has been harmed in any way.

The protection that is extended against the results of juror intoxication has been described in various ways. In State v. Crocker, 239 N.C. 446, 80 S.E.2d 243, 247-48 (1954), for example, the court observed that

> [w]here a juror, while hearing the evidence or while hearing the argument of counsel or the charge or while deliberating as to verdict, is so incapacitated by reason of intoxicants or otherwise as to be incapable, physically or mentally, of functioning as a competent, qualified juror, the trial judge may order a mistrial.

In State v. Johnson, 586 S.W.2d 437, 442 (Mo. Ct. App. 1979), the court held that the defendant would be entitled to relief if he could show that one of the jurors had consumed alcoholic beverages and the mind of the juror was affected by alcohol or suffered some degree of intoxication. Finally, in United States v. Taliaferro, 558 F.2d 724

(4th Cir. 1977), cert. denied, 434 U.S. 1016 (1978), the court stated that the defendant should be granted a new trial if a juror is shown to have consumed alcoholic beverages during the trial and the juror "became intoxicated so that he or she was affected in performance of his or her duties." 558 F.2d at 726; see also Baker v. Hudspeth, 129 F.2d 779 (10th Cir.), cert. denied sub nom. Baker v. Hunter, 317 U.S. 681 (1942); State v. Ovitt, 126 Vt. 320, 229 A.2d 237 (1967).

A classic illustration of prejudice from juror consumption of alcoholic beverages sufficient to warrant a new trial is Myers v. State, 111 Ark. 393, 163 S.W. 1177 (1914). There, the defendant, convicted of rape, became aware that the jurors had consumed a fairly large quantity of alcoholic beverages during his trial. According to the testimony taken on this matter, ten of the jurors had

consumed approximately seven quarts of whiskey during the defendant's three-day trial before the verdict was entered. The defendant contended that the consumption of this quantity of liquor did of necessity prejudice his case because it is not possible for persons consuming such a quantity of alcohol to keep a clear and attentive mind. The court agreed with the defendant's argument and ordered that a new trial be held based upon the following reasons:

> We are of the opinion that the use of intoxicating liquors by the jury as shown by the uncontradicted evidence in this case was so excessive as to render all who partook of it absolutely incapable of that calm, dispassionate, and impartial consideration of the case which the law demands. It would be a travesty upon the administration of justice to permit a verdict to stand where the jurors rendering it are subjected to influences so calculated to impair their reason and inflame their passions and prejudices. It would be impossible for jurors who indulged in intoxicating liquors to the extent shown in this record to bring to bear upon the law and the facts in the case

> that discriminating and impartial judgment required in the proper exercise of their functions as jurors. It is a matter of common knowledge that the use of whiskey continuously and in large quantities and to excess stupefies the mental faculties and impairs the reason and judgment. No one who has drunk intoxicants to the extent shown by many of the jurors in this record could pass intelligently upon the issues in any case, much less in a case where one's life hangs in the judicial balance.

163 S.W. at 1182.

Another case wherein a new trial was deemed proper because of the use of intoxicating liquor by jurors during trial is State v. Demereste, 41 La. Ann. 413, 6 So. 654 (1889). In Demereste, the jurors in the defendant's case were brought to a hotel after the first day of the defendant's two-day trial. At the hotel they consumed unknown quantities of alcoholic beverages. Testimony revealed that the jurors did not appear to have been intoxicated, but that as

a result of their drinking they became boisterous and excited, and acted in an inappropriate way for a body deciding an important criminal matter. Based upon this showing the court held that the defendant had shown sufficient prejudice to warrant relief. The court was extremely concerned about the drastic impact even moderate quantities of alcoholic beverages could have on the deliberative process. Even absent a showing of intoxication in the case before it, the court found that the jurors' conduct demonstrated that there was a good chance that they would not give clear and careful consideration to the matter before them when they returned to court the next day. See also People v. Veal, 58 Ill. App. 3d 938, 374 N.E.2d 963 (1978) (fact that juror consumed pint of spirits night before and "a shot" prior to trial justified excusing juror for inattentiveness

because this constituted grave misconduct which would have prejudiced the rights of the defendants); State v. Salverson, 87 Minn. 40, 91 N.W. 1 (1902) (juror drowsiness at trial following consumption of alcoholic beverages creates strong implication that juror was not fit to serve as same).

In the case under consideration, juror number one was reported during trial as having been seen consuming alcohol from a small bottle in the hallway of the courthouse. At numerous times during trial, juror number one was observed to have been drowsy and inattentive. A meeting was held on this matter, but it was decided that no official action would be taken toward removing the juror, or otherwise attempting to alleviate the prejudice resulting from the juror's consumption of the alcoholic beverage. It is submitted, however, that even though the prosecutor and Mr.

Lopez's attorney, Mr. Yedlin, agreed that no hearing would be conducted inquiring into the intoxication of the juror, inquiry should have been made regardless. This is particularly true in light of the impaired judgment exhibited by Mr. Yedlin throughout the course of the trial which prejudiced Mr. Lopez. Thus, Mr. Lopez was effectively forced to allow an intoxicated, inattentive juror to decide his case. This is certainly improper, especially in such a serious matter as the present case. At the very least, a criminal defendant is entitled to have careful and sober minds decide his case. This entitlement, however, was not received. Therefore the decision should be reversed.

III. A NEW TRIAL IS WARRANTED BY THE SIXTH AMENDMENT WHEN ONE OR TWO JURORS HAVE LIED WHEN QUESTIONED ABOUT THEIR EXPOSURE TO PREJUDICIAL PUBLICITY CONCERNING THE CASE.

During trial, the court's attention was brought to the fact that a local newspaper had published a story which, if read by any of the jurors, could have been prejudicial to Mr. Lopez's case. The court thereupon polled the jurors to determine whether the objectivity of any of them had been affected adversely by the article. When juror number two (Mr. Pearlman) was questioned about the newspaper article he indicated that he was familiar with the article, that he had told another member of the jury (juror number six) of the article, and that juror number six did not respond to him concerning the article.

> MR. YEDLIN: May I ask one other questions?
>
> THE COURT: You may.
>
> MR. YEDLIN: When you spoke to the other juror and informed him of this, what did he say to you?

JUROR PEARLMAN: Nothing.

MR. YEDLIN: Not a word?

JUROR PEARLMAN: He did not respond, no.

When juror number six (Mr. Piggot) was questioned concerning the article, he admitted that juror number two had told him about it, but he contradicted juror number two's version of the facts and stated that he did respond to juror number two and told him that he did not want to become involved in discussing the article.

JUROR PIGGOTT: He asked the question, had I heard the radio.

I don't have a car radio, and I didn't hear the radio. He said it was on the radio about if the defendant was found guilty, that there would be--each count was five years and so many dollars fine.

And I said, "That doesn't worry me. I don't have to worry about that. My job is to make a decision, guilty or not guilty."

Then it later came out in the Grand Jury testimony the same thing he told me. I figured there was no reason to mention it to the Court at the time.

This inconsistency reveals that at least one of the jurors was not telling the truth when he responded to the court concerning the events following the publication of the article.

Mr. Lopez submits that jurors numbers two and six should not have been allowed to decide his case because of the untrue statements made to the court. As noted in the previous section, juror misconduct is treated very seriously by the courts, and a new trial is appropriate if misconduct is discovered and brought to the court's attention. This rule has been applied in the present factual context resulting in the formation of a general rule extending protection to defendants similarly situated to Mr. Lopez. See United States v. Brooks, 677 F.2d 907 (D.C. Cir. 1982); United States v. Moss, 591 F.2d 428 (8th Cir. 1979), vacated, 614 F.2d 171 (8th

Cir. 1980); United States v. Vento, 533 F.2d 838 (3d Cir. 1976); Ryan v. United States, 191 F.2d 779 (D.C. Cir. 1951), cert. denied, 342 U.S. 918 (1952); Moynahan v. United States, 31 Conn. Supp. 434, 334 A.2d 242 (1974); Gustafson v. Morrison, 57 Mich. App. 655, 226 N.W.2d 681 (1975). See also United States v. Armco Steel Co., 252 F. Supp. 364 (S.D. Cal. 1966).

It is well settled that a new trial is warranted when a juror deceives the court regarding his or her potential prejudice on the case. See Photostat Corp. v. Ball, 338 F.2d 783 (10th Cir. 1964); United States v. Cavell, 287 F.2d 792 (3d Cir. 1961); Consolidated Gas & Equipment Co. of America v. Carver, 257 F.2d 111 (10th Cir. 1958); United States v. McCorkle, 248 F.2d 1 (3d Cir. 1957). Although these cases involved jurors who lied during the peremptory

challenge phase of trial, the principles hold equally true for jurors who lie to the court after this stage. As noted by the court in Photostat Corp. v. Ball, supra:

> The answers to questions put by the Court necessarily form the basis for the Court's excusing a juror on its own motion or challenges for cause * * * and the exercise of peremptory challenges by each side. Necessarily, it is expected and required that jurors in their answers shall be completely truthful and that they shall disclose, upon a general question, any matters which might tend to disqualify them from sitting on the case for any reason. It therefore becomes imperative that the answers be truthful and complete. False or misleading answers may result in the seating of a juror who might have been discharged by the Court, challenged for cause by counsel or stricken through the exercise of peremptory challenge. The seating of such a juror could and probably would result in a miscarriage of justice and therefore courts and attorneys, who are officials of the court, are ever mindful of the importance of jurors' answers to questions regarding their qualifications.

338 F.2d at 786 (quoting United States v. Freedland, 111 F. Supp. 852, 853 (D.D.C.

1953)).

A juror who has lied to the court concerning any matter is unreliable and untrustworthy. He or she certainly cannot be entrusted to perform the important duties assigned to jurors. This is particularly true where, as here, the juror's falsehoods or deceptions directly relate to the case he or she is deliberating on. Regardless of the nature or character of the lie, the judicial system cannot tolerate allowing jurors who are lying regarding their prejudice in a case to sit in the jury box and taint the judicial process. Accordingly, a new trial was required in order to afford Mr. Lopez his right to trial by an impartial jury. The case should therefore be reversed.

IV. THE TRIAL COURT VIOLATED THE PETITIONER'S SIXTH AMENDMENT RIGHTS BY FAILING TO RECOUNT IMPORTANT TESTIMONY TO THE JURY AS REQUESTED BY THE JURY DURING ITS DELIBERATIONS.

In the middle of its deliberations, the jury brought two questions to the trial court's attention, the second of which is pertinent to the instant issue. The jury requested that its recollection be refreshed as to what the result would have been if box 22A of the I-485 forms that were the subject of the case against Mr. Lopez had been left blank. Particularly, the jury was interested in receiving a recounting of the testimony of the government's expert in this area, Ralph Belt.

Despite the request of the jury, the court declined to read the pertinent portions of Mr. Belt's testimony to the jury. Rather, the jury was informed that it should continue

its deliberations and use its own recollection regarding the testimony.

Mr. Lopez submits that the trial court erred in refusing to refresh the jury's recollection. Clearly, a trial judge generally possesses a good deal of discretion in rulings on requests for testimony to be restated. See United States v. King, 552 F.2d 833 (9th Cir. 1976), cert. denied, 430 U.S. 966 (1977). It is an abuse of this discretion not to read requested testimony, however, when an unfairness to the defendant results therefrom. See United States v. Bassler, 651 F.2d 600 (8th Cir. 1981), cert. denied sub nom. Sprecher v. United States, 454 U.S. 944 (1982).

An effective illustration of circumstances sufficient to support a finding of unfairness, is the case of United States v. Rabb, 453 F.2d 1012 (3d Cir. 1971). There,

the defendant was on trial for murder and had been connected to the crime through the testimony of three eyewitnesses. After the evidence had been taken and the jury had deliberated for about two hours, they returned to the courtroom and asked the trial judge to read the testimony of two of the eyewitnesses. This testimony consisted of approximately forty transcript pages, and reading this portion of the transcript would have taken less than an hour. The trial judge nevertheless declined to read this testimony to the jury, and the jury returned to its deliberations. The defendant was ultimately convicted.

The defendant appealed, asserting error in the trial judge's refusal to comply with the jury's request. The appeals court found error and reversed the defendant's conviction. In so doing, the court acknowledged

that trial judges are normally given broad discretion in this area. In the case before it, however, the need to repeat the requested testimony outweighed the policies behind the discretion accorded to the trial court. The testimony in question, that of two eyewitnesses to the crime charged, was important testimony. Also, it constituted a large part of the government's case. Additionally, the court was influenced by the fact that the requested testimony was not voluminous, and could have been recounted without extraordinary difficulty. See also United States v. Jackson, 257 F.2d 41 (3d Cir. 1958) (in entrapment case it was error for judge to fail to re-read testimony regarding whether government informant was a government employee, because this was important to defense theory and would have been useful in jury deliberations).

The present case is similar to Rabb and Jackson. First, the requested testimony was very important to Mr. Lopez's case. In the requested transcript portion, the government's expert witness, Mr. Belt, testified that if box 22A of the I-485 forms that were the subject of the defendant's case had been left blank, the forms would have been returned to the persons who had submitted them. On direct examination, the following testimony was elicited by the government:

> Q. Now, Mr. Belt, let me give you this hypothet:
>
> Let's say an alien, a foreign national citizen, files an application for adjustment of status with the Immigration Service and does not allege any priority date at all, nothing, and mails it in.
>
> What does the Immigration Service do with that application?
>
> A. It would be rejected.

Moreover, on cross-examination, Mr. Belt further testified that an I-485 form would be rejected outright if box 22A were left blank:

A. If an application--first of all, in order to properly file an application, it must have a valid priority date. A visa number must be currently available.

If a visa number is not currently available, the application should be rejected.

Q. All right. Then you did not even have to verify a priority date by Telexing or anything if, on the face of the document, the I-485 form, if on the very face of the document--don't look at those. I am not referring to those.

A. Okay.

Q. I am asking you a general question, sir.

If, on the very face of the I-485 form, if on that very face of it, the priority date, the quota numbers are not current, or there is not available at the time of the submission of the I-485 form, that is the readjustment form, right on its face it is not current you do not have to Telex or anything; it should be rejected immediately, right then and there?

A. That is correct.

Q. So that if these forms were submitted with--I am sure you can hear me without this. If the forms were submitted without a current or available priority date, they should have been

> rejected immediately and it not require Telexing, or anything.

This testimony lent strong support to the essence of the defense; that the false dates were not placed on the I-485 forms with the intent to derive any benefit. Rather, the dates were simply placed there to facilitate adjudication of the application, albeit resulting in negative decisions as discussed previously. The failure of the court to read this testimony effectively deprived Mr. Lopez of his entire defense to the prosecution against him.

In addition, as in Rabb, it is submitted that the testimony in question was not voluminous. It would not have been unduly burdensome or time consuming for the court to have read it to the jury. As in Rabb and Jackson, therefore, Mr. Lopez should have been granted relief, viz., a new trial. Accordingly, the decision should be reversed.

V. THE PETITIONER WAS CONVICTED IMPROPERLY AND IN VIOLATION OF HIS SIXTH AMENDMENT RIGHTS ON EIGHT COUNTS OF THE INDICTMENT IN THAT THE CONVICTIONS WERE BASED SOLELY UPON TRANSCRIPT TESTIMONY TAKEN BEFORE THE GRAND JURY WHICH WAS SUBSTITUTED FOR THE WITNESSES' LIVE TESTIMONY DUE TO THE GOVERNMENT'S SIMPLE FAILURE TO CALL THE WITNESSES.

Each of the eight counts of the indictment in question was based upon an alleged false statement having been made on an I-485 form filed on behalf of a particular former client of Mr. Lopez. The testimony of each former client thus comprised the key testimony on each count. These individuals were not called by the government to testify at trial, however. Instead, the government simply read the transcript of the testimony previously given by each witness before the grand jury, over objection. The conviction on each of these counts is thus based upon the out-of-court testimony of a witness who

testified in a setting in which Mr. Lopez was denied the right and opportunity to cross-examine.

Mr. Lopez maintains that his convictions, based upon the witnesses' grand jury testimony, were improper. The applicable rule in the Eleventh Circuit is clear. The key case is United States v. Gonzalez, 559 F.2d 1271 (5th Cir. 1977). In Gonzalez, the defendant's conviction was based upon the grand jury testimony of his convicted co-conspirator. The co-conspirator had refused to testify at trial, and so the prosecution decided to submit the grand jury testimony in its place. The defendant contended that his conviction based upon such testimony was improper because the grand jury testimony was hearsay, and was not within any of the recognized exceptions. The prosecution contended that the testimony was properly admitted

under Fed. R. Evid. 804(b)(5), the "catchall" exception, allowing the admission of otherwise inadmissable hearsay evidence "having equivalent circumstantial guarantees of trustworthiness." The court rejected this contention. It surveyed the circumstances behind the witness's decision to testify before the grand jury and found them not to create the appearance of reliability. Also, the court noted that the defendant never had the opportunity to cross-examine the witness before the grand jury, and absent this opportunity the testimony could not be considered truly reliable. Accord United States v. Fiore, 43 F.2d 112 (2d Cir. 1971), cert. denied, 410 U.S. 984 (1973).

Gonzalez is controlling in the instant case. The defendant was never given the opportunity to cross-examine any of the witnesses whose grand jury testimony was read

into evidence at trial. Also, when the testimony was given, the grand jury witnesses were cooperating with the government to lessen the chance of their criminal prosecution and this fact reduces severely the probability of reliability of their testimony.

In addition to these facts, however, there is one distinguishing feature between Gonzalez and the present case that compels the conclusion that the defendant's convictions based on the grand jury transcript evidence was improper. Unlike Gonzalez, there was never any showing in the present case that the witnesses in question were not available to testify. Absent such a showing, there is no reason to admit the transcript testimony. See generally United States v. Pelton, 578 F.2d 701 (8th Cir.), cert. denied, 439 U.S. 964 (1978); United States v. Amaya, 533 F.2d 188 (5th Cir.), cert. denied,

429 U.S. 1101 (1976). An illustrative decision is United States v. Lynch, 499 F.2d 1011 (D.C. Cir. 1974). In Lynch, the prosecution had offered into evidence the preliminary hearing transcript testimony of a crucial government witness rather than calling the witness to testify. The government, however, was able to present no reason for failing to call the witness. The government was unable to demonstrate that the witness was outside of the court's jurisdiction, or was physically or mentally unable to testify, or with a diligent effort could not be located. On such facts, the court ruled that the defendant's conviction was improper. Transcript testimony is always a poor substitute for live testimony, it was reasoned, and the absence of any justifiable excuse for the failure to present testimony compelled a holding that the defendant was convicted

improperly.

The result reached in the cases heretofore discussed should also have been reached in the instant case. Mr. Lopez was in no way responsible for the absence of crucial witnesses; rather, the government simply declined to call the witnesses to trial. Mr. Lopez was clearly prejudiced by this as he was denied the ability to cross-examine the absent witnesses. This constituted an impermissible denial of the right to cross-examine adverse witnesses as guaranteed by the sixth amendment. It is therefore submitted that the convictions obtained as a result of this constitutional violation were improper.

This error was compounded by the fact that these additional eight counts no doubt prejudiced the jury against Mr. Lopez by sheer weight of numbers. The multiple count indictment weighed heavily against Mr. Lopez

and assuredly rendered the jury prejudiced to find him guilty in view of the numerous counts. It is well-settled that in order to warrant a proper jury instruction, there must be some appreciable or substantial evidence to support the question involved. Pipkin v. United States, 243 F.2d 491 (5th Cir. 1957); Shurman v. United States, 233 F.2d 272 (5th Cir. 1956). Moreover, improper instruction on a count for which there is insufficient evidence will constitute prejudicial error. United States v. Malde, 513 F.2d 97 (1st Cir. 1975); Cass v. United States, 361 F.2d 409 (9th Cir. 1966). Indeed, absent indication that the erroneous instruction was properly disregarded by the jury, the cumulative effect of rendering improper instructions on additional counts affects a jury's deliberation. United States v. Lanier, 578 F.2d 1246 (8th Cir. 1978); see also United States v. Sandy,

421 F.2d 182 (9th Cir. 1970) (no error if improper charge is withdrawn). In Lanier, no error was deemed to have occurred because the jury acquitted on the erroneous superfluous counts. The court stated that this clearly indicated that the jury gave proper independent consideration to each count. In the instant case, however, there is no such evidence that the jury gave such proper independent consideration. Clearly, Mr. Lopez's sixth amendment right to a trial by an impartial jury was infringed.

CONCLUSION

The standard for materiality adopted by the the Eleventh Circuit is erroneous and at variance with prevailing definitions applied in other circuit courts of appeal. Moreover, a new trial should have been granted in the instant case due to juror intoxication, juror prevarications regarding potential prejudice, trial court failure to recount crucial testimony, and denial of confrontation rights as guaranteed by the sixth amendment.

THEREFORE, this appeal brings before the Court substantial questions which require plenary consideration, with briefs on the merits and oral argument. The petitioner requests that a Writ of Certiorari be granted.

Respectfully submitted,

PETER M. LOPEZ

Peter M. Lopez
Peter M. Lopez & Associates
Suite 202, Roberts Building
28 West Flagler Street
Miami, Florida 33130
(305) 377-1462

No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1983

PETER M. LOPEZ,
Petitioner,

v.

UNITED STATES,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE CIRCUIT COURT OF APPEALS
FOR THE ELEVENTH JUDICIAL COURT

APPENDIX

PETER M. LOPEZ IN PRO PER.
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Attorney for Petitioner

TABLE OF CONTENTS

UNITED STATES DISTRICT COU
SOUTHERN DISTRICT OF FLORID
MIAMI, FLORIDA

CASE NO.: 81-513-CR-WMH

UNITED STATES OF AMERICA

vs.

PETER MIGUEL LOPEZ

ACCEPTED & FILED IN OPEN COURT
ON 11/3/82 AT
Miami FLA.
Joseph I. Bogart, Clerk
United States District Court
Southern District of Florida

V E R D I C T

We, the jury, find the defendant, PETER MIGUEL LOPEZ,

as to Count One, Guilty.
as to Count Two, Guilty.
as to Count Three, Guilty.
as to Count Four, Guilty.
as to Count Five, Guilty.
as to Count Six, Guilty.
as to Count Seven, Guilty.
as to Count Eight, Guilty.
as to Count Nine, Guilty.
as to Count Ten, Guilty.
as to Count Eleven, Guilty.
as to Count Twelve, Guilty.
as to Count Thirteen, Guilty.
as to Count Fourteen, Guilty.
as to Count Fifteen, Guilty.
as to Count Sixteen, Guilty.
as to Count Seventeen, Guilty.
as to Count Eighteen, Guilty.
as to Count Nineteen, Guilty.
as to Count Twenty, Guilty.
as to Count Twenty-One, Guilty.
as to Count Twenty-Two, Guilty.

RECD	TO JUDGE
11-3	11-12
BY	1:15

SO SAY WE ALL.

DATED: 11/3/82

Foreman

FILED IN THE U.S.D.C. FLA.
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S.D. OF FLA.

257

things, and then I will ask counsel to comment on it.

First, I have reviewed your papers, I think with some care, and I cannot escape the conclusion, even though I would like to escape the conclusion, that the--there was something to be gained by your plan that the misstatements were material, that there were benefits which were either obtained or could have been obtained, that you would be charged further as it proceeded by certain letters that were written by representations made in at least one hearing, that the period of time involved was such that it places your theory in some doubt, and I rather suspect the jury felt that--

MR. LOPEZ: Yes, sir.

THE COURT: --that the people in this case, all those--though I am not sure it is necessary to the cause of action presented by the Government--the people in this case were injured as well, in terms of money, time, situation, and I think that adds to the basic claim, the cause of the Government, this was sufficient to go to the jury.

There was evidence of materiality, there was evidence on which a jury could return a verdict of guilty, which they did, and that there is not enough evidence for me to say that the jury's verdict was based on insufficient evidence or misplaced legal theory.

And I must deny the motion for retrial.

Now, as to the collateral items raised, one, the juror who you refer to in your paper as intoxicated, I will say that at no time did I view him as being intoxicated.

I am going to ask counsel for the Government to comment on that--you may make whatever you wish to make.

I will state for the record, I did get both members of counsel, what the members of my staff said about seeing a man apparently taking a drink from the miniature bottle during a luncheon recess.

I asked counsel if they wished to press the matter. Neither did, and we proceeded to trial.

As to the other item related to the two jurors, one of whom had heard something on the radio, I find no basis whatsoever to entertain that information for a retrial.

So, as to those reasons, for the request for a new trial as well as the incompetency of counsel, I find no basis to entertain those beyond setting them, and I am going to deny the motion on those bases, as well.

While I can see Mr. Yedland was upset from time to time, it was my perception that it grew out of his personality and his concern for you, which he demonstrated not only at trial, but at pretrial hearing.

MR. LOPEZ: Your Honor, I had a dream which was the closing argument. The failure of presenting all of these documentations to the jury, I believe, your Honor, are highly provative that my counsel was not effectively defending my case.

The Court will remember that in the room there were twenty-two 4-I-85's which I admitted with ribbons and everything that looked very, very official, and not one single paper in favor of the defendant.

Your Honor, I had papers galore to show to that jury, and at least they would have weighed impartially one thing or the other, and if I would have been convicted at that time with all those documents inside, given to the jury, I would have had the opportunity--not that I had a dream, but that I was innocent because of X-theory, your Honor, I probably would not have filed a motion for the new trial.

It hurt me much more, the fact that Mr. Yedland had failed to do that, and what he did affirmatively and whether or not the juror was drunk, whether the two other jurors either lied to each other or broke the oath that they were not to discuss the case with each other during the pendency of the trial.

Now, your Honor, it hurts because in the sense that you know you did something which is correct and not

within 18,1001, because, your Honor, it lacked the intent to defraud anybody.

THE COURT: That's what the jury had to decide, and they decided against you.

MR. LOPEZ: Your Honor, if I had all those documents into the jury room, of course, this is now conjectural and history, but the results would have been obtained because of the failure of my counsel to put before that jury all of the things I put before you in the motion of the new trial.

But I accept your ruling, your Honor, but definitely you saw it as it came. I can't do anything further but--

THE COURT: Mr. Bondi, do you have any comments?

MR. BONDI: Not on what the Court has stated so far, unless the Court wants me to address something in particular.

THE COURT: Only in whatever record value it may have if the observation of one juror, number one juror, I believe--

MR. BONDI: Yes, he was seating as juror number one.

THE COURT: If you have an observation--

MR. BONDI: Only that, your Honor, it seemed to

me that all of the jurors were in and out of the courtroom frequently because there were several sidebar conferences and conferences where the jury was asked to go outside, and no one appeared to me to be walking improperly or not paying attention to the evidence when witnesses were on the stand.

I do point out to the Court that my recollection of the chamber conferences that we had, one of your staff had said that he or she, I'm not even sure which it was, had observed a juror with a paper bag and appeared to be drinking something out of the paper bag.

They didn't know if it was soda or in a bottle or even if it was an alcoholic beverage, just in a paper bag.

THE COURT: That isn't quite my recollection, but I will certainly accept yours for the record.

MR. BONDI: Juror number one didn't appear to be any different than the other twelve seated there.

MR. LOPEZ: May I say the last word, your Honor?

THE COURT: You may.

MR. LOPEZ: Your Honor, when you wish to do any drinking on a continuous basis--you either go out and get a drink, but you don't bring your bottle with you and keep it on your body because you know you want it in that way to keep drinking, and I have got claim witnesses to

the Court?

MR. LOPEZ: Not to the Court, but to my attorney.

THE COURT: Did you bring to my attention that you had seen ten others--

MR. LOPEZ: No, I did not, your Honor, because I thought this was so obvious that we commented on it and then I never learned about this imbibing continuously in the hallways of the court.

THE COURT: Continuously? Where did you get that? Did you have some witnesses who saw that?

MR. LOPEZ: No, I don't have any witnesses.

THE COURT: That's what you just said.

MR. LOPEZ: Your Honor, if you buy that little bottle and keep it in your pocket, the inference is very clear that you plan to continue to drink out of it.

THE COURT: What little bottle?

MR. LOPEZ: Whatever the member of your staff saw the man drinking out of. It could have been holy water, your Honor, but I don't think it was holy water. It was reported to you.

THE COURT: All right. If you wish to make a report of that, you can do so. You have not submitted any affidavits in support of your motion in that regard, and you tell me now you have ten witnesses. You have

never brought that to my attention before.

Therefore, I must deny the motion.

Let's proceed with the sentencing.

MR. LOPEZ: Thank you, sir.

THE COURT: Mr. Lopez, you have the right to say whatever you wish to say before the Court imposes the sentence, to present whatever you would like me to hear, and I will certainly be glad to hear it.

MR. LOPEZ: Your Honor, I am an attorney. I have filed for my reinstatement of counsel. I previously stated to the Court that I would rely on the mercy of the Court and the wisdom of the Court.

I don't feel that I am guilty, but I guess everybody says so. But if I could only continue or be given the chance to practice law, and this may be achieved by this Court probono by way of a withholding of the adjudication of guilt and some kind of probation, whatever the Court wishes or whatever the Court would decide, but provided that withholding of adjudication of guilt shall be there.

In that event, I would not be suspended again from the practice of law, and I could continue on my profession, your Honor, well knowing that you just don't put a date on a document that doesn't belong there.

As to the rest of my life, I think it has been

UNITED STATES COURT OF APPEALS
For The Eleventh Circuit

No. 82-6177

United States of America,
Plaintiff-Appellee,

v.

Peter Miguel Lopez,
Defendant-Appellant.

Peter Miguel Lopez, pro se.

Stanley Marcus, U.S. Atty., Linda Collins Hertz, Robert J. Bondi, Asst. U.S. Attys., Miami, Fla., for plaintiff-appellee.

Appeals from the United States District Court for the Southern District of Florida.

Decided March 30, 1984

Before HATCHETT, ANDERSON and CLARK, Circuit Judges.

PER CURIAM:

Appellant Peter Lopez was convicted in a jury trial for giving false information to the Immigration and Naturalization Service ("INS"), in violation of 18 U.S.C.A. § 1001 (West 1976). On appeal, he alleges, inter alia, that the false information he provided was not "material" so as to support his criminal conviction. We affirm.

I.

Peter Lopez is an attorney in Miami, Florida, with an active immigration law practice. Between 1978 and 1980, he represented 22 foreign nationals seeking residency in the United States. His actions on behalf of these clients are the source of the conviction appealed from.

Lopez filed an Application for Status as Permanent Resident (Form I-485) for each of his 22 clients. The form has a box for entering an applicant's "priority date,"

i.e., the date that the foreign citizen first notified an American Consular office of the intention to seek residency in the United States. This date is used to determine the order in which aliens will be granted residency according to the preference system used by the INS.

Lopez acknowledges that he knowingly placed false priority dates on the applications. None of his clients had, in fact, received priority dates when the forms were filed. Lopez' reason for this intentional deception is complicated. He testified that he planned to file a class action lawsuit or seek a private bill in Congress on behalf of his clients in order to obtain residency for them. However, he determined that neither option would be available unless he first "exhausted" administrative remedies before the INS. Because he thought that the placement of a false priority date normally

results in an accelerated official denial of an application (whereas explaining that the applicant has no date prevents the INS from deciding the application), he chose to falsify the information and thereby speed up the exhaustion of administrative remedies.[1] These falsifications were detected and this criminal action was initiated.

II.

On appeal, Lopez raises various issues. We consider the following:

(A) Were the falsified statements "material" within the meaning of 18 U.S.C.A. § 1001?

(B) Did the trial court commit error by failing to recount certain testimony when requested by the jury?

(C) Did the allegation that one juror may have consumed alcohol during the trial warrant a new trial?

(D) Was Lopez' trial counsel ineffective?[2]

A. The "Materiality" of the False Statements

18 U.S.C.A. § 1001 (West 1976) states:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than 5 years, or both.

The requirement that the falsification be of a "material" fact, while only contained in the first clause of the statute, has been read into the entire statute so as to exclude trivial falsifications from its coverage. United States v. Lichenstein, 610 F.2d 1272, 1278 (5th Cir.), cert. denied, 447 U.S. 907, 100 S.Ct. 2991, 64 L. Ed. 2d 856 (1980).[3] To be "material," a falsification "must have a natural tendency to influence, or be capable of affecting or influencing, a government

function." United States v. McGough, 510 F.2d 598, 602 (5th Cir.1975).[4] It makes no difference that a specific falsification did not exert influence so long as it had the capacity to do so. United States v. Lichenstein, 610 F.2d at 1278.

Lopez argues that his falsifications had no capacity to influence INS activity. He thought that the priority dates would be checked, found to be false, and lead to the denial of the applications. In fact, the very success of his scheme to bypass administrative remedies depended on the discovery of the falsification. In every case, the improper priority date was eventually discovered by INS officials.

Even assuming that Lopez' statements could not trick the INS into granting residency, several considerations combine to persuade us that the district court was correct in concluding that the "materiality"

element is met here.

The submission of falsehoods influenced the agency's treatement of the applications. Had no date been placed on the forms, they would have been returned to the applicants. Instead, Lopez placed false dates on the forms to compel a denial that would serve his personal ends. The capacity of the falsehoods to compel a different agency response establishes "materiality."

In addition, the applications improperly inconvenienced the agency. The INS is a publicly-funded agency with a specific duty to perform. It should not have to waste public resources by processing deceptive applications for an attorney who seeks to employ it as a device to facilitate his plan to file lawsuits on behalf of paying clients. We would be reluctant to hold that a person could file false statements, intending that a government agency would be inconvenienced

thereby, so long as he felt that the inconvenience was not too serious. Lopez' intentional diversion of the INS from its duty to process sincere applications had that capacity "to impair or pervert the functioning of a governmental agency" which is the heart of the "materiality" requirement. United States v. Lichenstein, 610 F.2d at 1278.

Finally, testimony at trial suggested that aliens with pending I-485 forms would be eligible for various collaterial [sic] benefits (e.g., work or travel permits). The pendency of the false applications had the "capacity" to improperly affect agency functioning in the grant of such benefits. That capacity is further support for the district court's "materiality" ruling.

The result we reach is supported by United States v. Diaz, 690 F.2d 1352 (11th Cir.1982). In Diaz, the defendants were convicted for falsifying records at a plasma

center licensed by the Food and Drug Administration ("FDA"). The defendants had overbled certain donors, failed to keep current names or addresses, and falsely labeled plasma containers. This court upheld their convictions under 18 U.S.C.A. § 1001 even though there was no requirement--statutory or regulatory--that they keep any records at all. In doing so, it found that the falsifications "could impair the FDA in carrying out its responsibility for protection of the public health." Id. at 1358.

Here was more than a gratuitous recording of false information that could hypothetically impair a government agency. The active filing of the false priority dates (on forms containing a specific warning against the assertion of untrue claims) forced agency officials to engage in needless work. Such action is inexcusable.

B. The Trial Judge's Failure to Recount Testimony

The jury, during its deliberations, asked the trial judge whether there was testimony about the effect of failing to place a "priority date" on an I-485 form. The judge declined to recount the testimony of two witnesses on this point, instructing the jury that it should use its "collective recollection" in arriving at a verdict. Lopez claims that the refusal to review this testimony was error.

A trial judge has broad discretion in responding to the jury's request to read portions of the evidence. United States v. Quesada-Rosadal, 685 F.2d 1281 (11th Cir. 1982). The judge's refusal to read the testimony was not an abuse of discretion in this case.

C. The Allegation of Jury Impropriety

During a recess in the trial, a member of the trial judge's staff saw a juror sipping from a miniature glass bottle. When notified of this, the judge asked the prosecutor and defense counsel if they wished to explore this alleged impropriety. Both counsel refused opportunity to press the issue.

A judge's decision on whether to interrogate a juror regarding alleged misconduct is within his discretion. United States v. Williams, 716 F.2d 864 (11th Cir.1983). Given the sketchy nature of the allegation and the lack of interest shown by either attorney when the allegation was made, it was not an "abuse of discretion" for the trial judge to proceed without a hearing about possible misconduct.[5]

D. The Effectiveness of Defense Counsel

Lopez claims that his trial counsel was ineffective. In this circuit, a claim of ineffective assistance of counsel will not be considered for the first time on direct appeal. United States v. Griffin, 699 F.2d 1102, 1107 (11th Cir.1983). This rule is necessary because the record of the trial court's proceeding is normally insufficient for purposes of evaluating counsel's performance.

In this case, Lopez did raise the ineffective assistance of claim [sic] in a motion for new trial. The issue, therefore, is not presented for the first time on direct appeal. However, the facts placed in the record by that motion and the subsequent hearing are an insufficient basis upon which to make a ruling. Accordingly, we conclude that the issue is not properly raised here.

For the foregoing reasons, the appellant's conviction is AFFIRMED.

FOOTNOTES

[1]By choosing to falsify priority dates, Lopez impermissibly skipped over the normal administrative procedures used to first decide an alien's residency status.

[2]Lopez raises four other issues--that jurors improperly lied when questioned about pretrial publicity; that the court improperly allowed the testimony of absent grand jury witnesses to be read; that Lopez was not put on notice that falsifying information was potentially criminal; and that delay rendered the trial unfair. These arguments are without legal or factual support and require no discussion.

[3]In Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir.1981) (en banc), this court adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981. Id. at 1209.

[4]"Materiality" is determined by the district court as a question of law. The ruling, therefore, is subject to complete review by this court. United States v. Lichenstein, 610 F.2d 1272 (5th Cir.1980).

[5]Lopez alleges that his counsel was ineffective. We decide, infra, that such an allegation cannot be handled on direct appeal due to the lack of developemnt of a record on the ineffectiveness point.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 82-6117

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

PETER MIGUEL LOPEZ,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion March 30, 11 Cir., 1984, _____F.2d_____).

(May 7, 1984)

Before HATCHETT, ANDERSON and CLARK, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

United States Circuit Judge

REHG-6
(Rev. 6/82)

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

18 U.S.C. § 1001

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick,

scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1002

Whoever, knowingly and with intent to defraud the United States, or any agency thereof, possesses any false, altered, forged, or counterfeited writing or document for the purpose of enabling another to obtain from the United States, or from any agency, officer or agent thereof, any sum of money, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

28 U.S.C. § 1254

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to

which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.